

ORDINANCE NO. 34-2021 (PSH), *Second Reading*

By Council Member Cobb

An Ordinance enacting new Chapter 765 of the Cleveland Heights Codified Ordinances, pertaining to third-party food delivery services; establishing a limit on the commission that third parties can charge to restaurants located in the City of Cleveland Heights to 15% of the purchase price on delivery or pick-up orders while restaurants are unable to provide unrestricted dine-in service; prohibiting a reduction in compensation for delivery drivers as a result of this limit; and declaring an emergency.

WHEREAS, COVID-19 is a respiratory disease that can result in serious illness or death, caused by the SARS-CoV-2 virus, a new strain of coronavirus not previously identified in humans that spreads easily from person to person through respiratory droplets; and

WHEREAS, on January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern; and

WHEREAS, on January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19; and

WHEREAS, on March 9, 2020, Governor Mike DeWine signed an Executive Order declaring a State of Emergency for Ohio in relation to COVID-19; and

WHEREAS, effective March 15, 2020, the Governor and the Ohio Department of Health issued an order limiting restaurants to providing only carry-out service; and

WHEREAS, on March 16, 2020 this Council, through Resolution 022-2020, proclaimed an Emergency in Cleveland Heights based on the COVID-19 pandemic; and

WHEREAS on April 30, 2020, the Ohio Department of Health issued an Order allowing restaurant businesses to reopen but requiring compliance with social distancing and safety measures that reduce dine-in capacity; and

WHEREAS, during the COVID-19 pandemic it is critical that restaurants stay open because they are performing essential functions, along with grocery stores and other food services, providing the public with access to food, and the social distancing measures required to mitigate the spread of COVID-19 mean that delivery and take-out options from restaurants are critical to the public's access to food; and

WHEREAS, the COVID-19 pandemic has had significant impact on the local economy impacting the restaurant, food service, and other related industries resulting in economic hardship

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due to loss of income, layoffs, and reduced work hours for a significant percentage of the workforce; and

WHEREAS, reducing dine-in capacity for restaurants places a severe financial strain on many restaurants, which already operate on slim margins, particularly those that are small, independently owned, or minority-owned, adding to pre-existing economic pressures in the industry; and

WHEREAS, many consumers are eager to support local restaurants and use third-party applications and websites to place orders with those restaurants, for take-out and delivery, and these orders may include commission fees of 30% or more of the purchase price; and

WHEREAS, many restaurants have limited bargaining power to negotiate lower commission fees with third-party platforms due to high demand and few alternatives for online order and delivery services and as a result, face dire financial circumstances during the pandemic as take-out and delivery are the main options for keeping their businesses in operation; and

WHEREAS, capping the commission fee charged by third-party delivery services at 15% of the purchase price on delivery or pick-up orders so long as restaurants are unable to provide unrestricted dine-in service will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during the public health emergency, while promoting the availability of prepared food via delivery service, and will not unduly burden third-party applications and websites.

BE IT ORDAINED by the Council of the City of Cleveland Heights, Ohio that:

**SECTION 1.** That the Codified Ordinances of Cleveland Heights, Ohio, are supplemented by enacting new Chapter 765, Third-party Food Delivery Services, as follows:

**Chapter 765** **Third-party Food Delivery Services**

**Section 765.01** **Definitions**

For purposes of this chapter, the following terms shall mean:

- (a) “Commission” means a fee paid to a third-party food delivery service for performing a transaction or a service.
- (b) “Eating and drinking establishment” means a restaurant, bar, tavern, cabaret, fast-food business, nightclub, pub, dining room, dinner theater, or similar use.
- (c) “Person” means an organization, corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity.
- (d) “Purchase price” means the menu price of an online order, minus any applicable coupon or promotional discount provided to the customer by the eating and drinking

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establishment. Such price excludes taxes, gratuities, and any other fees that make up the total cost to the consumer of an online order.

- (e) “Third-party food delivery service” means any person who is engaged in operating a website, mobile application, or other internet service business that offers or arranges for the sale and/or delivery of food and beverages prepared by eating and drinking establishments.

### Section 765.02    Limit on Commissions

- (a) No third-party food delivery service shall charge an eating and drinking establishment a commission per online delivery or pick-up order for the use of its service that totals more than fifteen percent (15%) of the purchase price of the online order.
- (b) If a third-party food delivery service charges an eating and drinking establishment a commission that exceeds fifteen percent (15%) of the purchase price of a placed online order, the eating and drinking establishment shall provide written notice to the third-party food delivery service requesting a refund of the amount of commission paid in excess of the allowable fifteen percent (15%) within seven (7) business days. No third-party food delivery service shall fail to issue a refund within seven (7) business days of receipt of the notice.
- (c) An eating and drinking establishment may agree to pay a third-party food delivery service a fee that exceeds the limits established in Section 765.02 (a) and (b) to obtain optional products or services, including advertising, marketing, or access to customer subscription programs, in addition to delivery or pickup service.

### Section 765.03    Compensation

No third-party food delivery service shall reduce the compensation rates paid to any delivery service driver or garnish gratuities paid to any driver as a result of the provisions in this chapter.

### Section 765.04    Effective dates

This chapter shall be in effect only from the effective date of this ordinance until ninety (90) days after eating and drinking establishments are permitted to operate with no restrictions.

### Section 765.05    Severability

The provisions of this chapter shall be deemed to be severable; and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not impair any of the remaining provisions.

### Section 765.99    Penalties

- (a) A third-party food delivery service that violates any provision of this chapter is guilty of a misdemeanor of the first degree.

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(b) Strict liability is intended to be imposed as the culpable mental state for a violation of this chapter.

(c) In accordance with Section 501.11 of the Codified Ordinances of Cleveland Heights, Ohio, organizational criminal liability is intended to be imposed for violations of this chapter.

**SECTION 2.**

This Ordinance is hereby declared to be an emergency measure immediately necessary for the preservation of the public peace, health and welfare of the inhabitants of the City of Cleveland Heights, such emergency being the need to provide economic relief to restaurants in Cleveland Heights, which are providing an essential service to residents, at the earliest possible time. Wherefore, provided it receives the affirmative vote of five (5) or more of the members elected or appointed to this Council, this Ordinance shall take effect and be in force immediately upon its passage; otherwise, it shall take effect and be in force from and after the earliest time allowed by law.

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JASON S. STEIN  
President of Council

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AMY HIMMELEIN  
Clerk of Council

PASSED: April 19, 2021